In thus allowing a suit in the State where the wrongful act was committed, the court admits that it can take cognizance of the wrongful act alone, without having the land in its jurisdiction. If such wrongful act is transitory, as it certainly seems, there is no reason why it should not be made the basis of an action in any State where the defendant can be found. Another fine-drawn distinction arises where the cause of action consists in the removal of stone, timber, etc., from lands in other States. In this connection, many apparently conflicting decisions are reconciled when we observe that the question as to whether the action is local or transitory, depends entirely on the framing of the declaration. If the plaintiff ignores the damage to his freehold and simply brings a personal action, such as conversion, for the value of the timber or minerals removed, the action is transitory;[15] but if any part of the damages claimed is for injury to the freehold, the action is local.[16] Finally, a distinction which would have enabled the court in the principal case to take jurisdiction of the entire action, is made in some States between actions in trespass for direct injuries to land, and actions on the case for indirect injuries. According to this rule, where, as here, the gravamen of the action is simply the negligence of the defendant, such as permitting sparks to escape from locomotives, the action is transitory.[17] But even this doctrine has been repudiated by the weight of authority,[18] according to which the principal case is correct.

A LIMITATION ON THE RIGHT TO SUBROGATION.—A seemingly well-defined limitation on the doctrine of subrogation, a doctrine unusually difficult of definition, is the rule that subrogation will not be allowed to one who was personally and primarily liable on the debt which he has paid, for the reason that payment by one so liable operates to extinguish the debt with its lien. Within this description has been included the grantee of incumbered premises who has agreed to discharge the incumbrance. Although a typical case for subrogation is presented when a grantee who has merely taken subject to the incumbrance, discharges it in ignorance of a junior lien which by his payment will be given priority,[1] a strong line of decisions denies such relief to the grantee who by his agreement has made himself personally liable on the obligation.[2] It is difficult to see why this distinc-

[15]Hodges *v.* Hunter Co. (1911) 61 Fla. 280; Stone *v.* United States (1896) 167 U. S. 178, 182.

[16]Ophir Silver Mining Co. *v.* Superior Court (1905) 147 Cal. 467; Kentucky etc. Co. *v.* Mineral Development Co. (C. C. 1911) 191 Fed. 899.

[17]Ducktown Sulphur, etc. Co. *v.* Barnes (Tenn. 1900) 60 S. W. 593, 606; Home Ins. Co. *v.* Penn. R. R. (N. Y. 1877) 11 Hun 182; *cf.* Titus *v.* Frankfort (1838) 15 Me. 89.

[18]Brisbane *v.* Penn. R. R. (1912) 205 N. Y. 431 (three judges dissenting); Du Breuil *v.* The Pennsylvania Co. (1891) 130 Ind. 137; *cf.* Watts *v.* Kinney, *supra.* The addition in 1913 of § 982-a to the N. Y. Code of Civ. Proc., changed the rule in the Brisbane case, and makes the rule as to real property the same as the rule governing personal property.

[1]Barnes *v.* Mott (1876) 64 N. Y. 397; Ryer *v.* Gass (1881) 130 Mass. 227; Hudson *v.* Dismukes (1883) 77 Va. 242.

[2]Lackawanna Trust etc. Co. *v.* Gomeringer (1912) 236 Pa. 179; Cady *v.* Barnes (D. C. 1913) 208 Fed. 361; Poole *v.* Kelsey (1900) 95 Ill. App. 233; DeRoberts *v.* Stiles (1901) 24 Wash. 611; McDowell *v.* Lumber Co. (1906) 42 Tex. Civ. App. 260; Willson *v.* Burton (1880) 52 Vt. 394.

tion should be made, and in a number of jurisdictions, of which the recent case of *Tibbits* v. *Terrill* (Colo. 1914) 140 Pac. 936, is typical, the rule is not applied.[3] In that case a purchaser from a fraudulent grantor, having constructive, though not actual, notice that the conveyance to his grantor was in fraud of a judgment creditor having a lien on the land, was allowed subrogation, as against the judgment creditor, to the lien of a first mortgage which he had assumed and discharged. Since the courts, where the grantee has not assumed the incumbrance, have been willing to invoke subrogation to protect him when he has paid off the prior lien, and is in danger of losing the benefit of his payment because of the existence, unknown to him, of a junior lien, it seems wrong to deny such relief to another grantee because, as between himself and his grantor, he had agreed to pay the debt. While this agreement might properly defeat any equity he would otherwise have to subrogation against his grantor, it should not have such effect as between him and the second incumbrancer, as regards whom he was under no agreement to discharge the prior incumbrance.[4] The cases giving the agreement this effect announce, apparently without qualification, that payment by the owner of the legal estate, who is personally bound to pay, merges the lesser estate in the greater. As opposed to this, the group of cases of which the principal case is an example, declare that in equity the question of merger is governed by the intention of the parties, and they presume an intention to keep the interests separate when an intervening claim makes it to the advantage of the grantee to do so, making no distinction between a grantee who has assumed the incumbrance and one who has not.[5] In weighing the opposing equities of the grantee and the junior lienholder, these cases make the point that to allow subrogation works no hardship to the latter when he has not altered his position on the strength of the discharge of the prior incumbrance. His security when he acquired it was subject to this superior lien, and he should not reap the benefit of the other man's innocent mistake.[6]

Another element entering into the determination of the right to subrogation in these cases, is the effect of notice of the existence of a second incumbrance. In some of the cases denying subrogation, though the decisions are based on the effect of an agreement to discharge, the facts show that the grantee had actual notice of the intervening lien.[7] Such notice should materially weaken his equity to subrogation, as he made the payment with full knowledge of the circumstances and not by mistake.[8] As to just what notice is required to defeat the right, the cases differ; in the principal case and those in accord with it, there was at least constructive notice by record, and yet the claim was

[3]Matzen *v.* Schaeffer (1884) 65 Cal. 81; Capitol Nat. Bank *v.* Holmes (1908) 43 Colo. 154; Johnson *v.* Tootle (1897) 14 Utah 482; Wilson *v.* Kimball (1853) 27 N. H. 300; Clute *v.* Emmerich (1885) 99 N. Y. 342.

[4]Clute *v.* Emmerich, *supra*.

[5]Duffy *v.* McGuiness (1882) 13 R. I. 595.

[6]See cases cited in note 3, *supra*.

[7]See Lackawanna Trust etc. Co. *v.* Gomeringer, *supra*; Cady *v.* Barnes, *supra*; DeRoberts *v.* Stiles, *supra*; Willson *v.* Burton, *supra*.

[8]But see Joyce *v.* Dauntz (1896) 55 Ohio St. 538 (holding that the right is not affected by notice); Stantons *v.* Thompson (1870) 49 N. H. 272 (holding that where there is a title intervening between the two interests, it will be presumed as a matter of law that the parties did not intend a merger).

allowed.[9] There is, however, good authority for the holding that subrogation will not be allowed one who has discharged an incumbrance with constructive notice of an intervening claim.[10]

In the principal case, the further element of fraud was present; the court holding that the grantee was not, through constructive notice, chargeable with such participation in the fraud on the judgment creditor as would defeat his right to subrogation. One guilty of fraud has no right to equitable relief by subrogation.[11] The question here presented is whether one who has constructive or implied notice of the fraud is chargeable with participation in it, and it is quite generally held that constructive notice has this effect.[12] A few jurisdictions, however, including Colorado, seem to differentiate between constructive notice by record, and knowledge of facts sufficient to put a reasonable man on inquiry, holding that the former does not as a matter of law charge one with participation, though the latter may raise a question of fact for the jury as to participation in the fraud.[13]

PRIORITY OF JUDGMENT LIENS ON REAL ESTATE.—At common law, a judgment created no lien on real estate,[1] but the effect of the Statute of Westminster II, 13 Edw. I, c. 18, was to make all judgments liens on the debtors' lands from the first day of the term at which they were rendered.[2] That rule has since been changed by modern statutes, upon which judgment liens now depend and under which they date from the time when the judgments are docketed,[3] or entered,[4] and in some States from the time of their rendition.[5] These statutes are of substantially the same effect, for even under the last mentioned a judgment is not considered to have been rendered so as to constitute a lien until it has

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[9]See cases cited in note 3, *supra*; Neff *v.* Elder (1907) 84 Ark. 277.

[10]Ragan *v.* Standard Scale Co. (1907) 128 Ga. 544; Kitchell *v.* Mudgett (1877) 37 Mich. 81; Stastney *v.* Pease (1904) 124 Ia. 587; Kahn *v.* McConnell (1913) 37 Okla. 219; *cf.* Conner *v.* Welch (1881) 51 Wis. 431.

[11]Railroad Co. *v.* Soutter (1871) 13 Wall. 517; see Harris, Law of Subrogation, § 813.

[12]German Bank of Memphis *v.* United States (1893) 148 U. S. 573; Kansas Moline Plow Co. *v.* Sherman (1895) 3 Okla. 204; Salisbury *v.* Burr (1896) 114 Cal. 451; Moore *v.* Williamson (1888) 44 N. J. Eq. 496.

[13]Riethmann *v.* Godsman (1896) 23 Colo. 202; Greenwald *v.* Wales (1903) 174 N. Y. 140; see Carroll *v.* Hayward (1878) 124 Mass. 120. In the principal case, whereas the majority of the court finds mere constructive notice by record, the dissenting judge seems to think the attempted subrogee was in possession of facts which should have put him on inquiry, and that a former holding of the Supreme Court in the same case (44 Colo. 94) that this was sufficient to charge him with fraud, should be binding on this court in determining the right to subrogation.

[1]1 Black, Judgments (2nd ed.) § 397.

[2]See Savile *v.* Wiltshire (1746) 2 Barnes 212. For the various exceptions that were made to this rule, see 1 Black, Judgments (2nd ed.) §§ 441, 442.

[3]N. Y. Code Civ. Proc., § 1250; Cal. Code Civ. Proc., § 671; Minn. Gen. Stat., c. 77, § 7905.

[4]3 N. J. Comp. Stat. (1910) 2956, § 2; Fla. Gen. Stat. (1906) § 1600.

[5]1 Burns' Ann. Ind. Stat. (Rev. of 1908) § 635; Code of Ia. (1897) § 3801; Mo. Rev. Stat. (1909) §2125.